88-1166

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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DARRELL I. LOWE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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145 pp

## QUESTIONS PRESENTED

1. Whether the Due Process Clause of the United States Constitution prohibits the United States Government from charging a Defendant in an Indictment with violation of a Sentencing Enhancement Provision of the Firearms Owners' Protection Act of 1986, as though it were a Substantive Offense under said Act.

2. Whether this Court should review the issue of whether Section 924(e) of Title 18 of the United States Code is a Substantive Offense or a Sentencing Enhancement Provision, in order to give guidance and clarify the conflicting opinions with respect to the nature of 924(e) of Title 18 of the United States Code, among the various Circuits.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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DARRELL I. LOWE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

---

## PETITION

Petitioner, DARRELL I. LOWE, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 17, 1988.

## OPINIONS BELOW

The Judgment in a Criminal Case, Number 87-40006-01, in the United States District Court, Central District of Illinois, rendered and entered on February 4, 1988, by Michael M. Mihm, Judge, on a Jury Verdict of Guilty as to Count One of the offense of: Felon in Possession of a Firearm (armed career criminal) in violation of Title 18 U.S. Code, Section 924(e) as charged in the Indictment herein, that the Defendant is committed to Custody of the Attorney General or his authorized representative for imprisonment for a minimum term of fifteen (15) years without parole pursuant to Title 18, U.S. Code, Section 924(e)(1) with credit to be given for time already served.

The Judgment of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, decided and filed on

October 17, 1988, affirming said Judgment of the United States District Court of the Central District of Illinois, Rock Island Division, rendered and entered on February 4, 1988.

## SUPREME COURT JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, was entered on October 17, 1988. This Petition for Writ of Certiorari has been timely filed within Sixty (60) days thereafter (Supreme Court Rule 20(1)). The Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254 (1).

The Trial Court had original and exclusive jurisdiction pursuant to Title 18, Section 3231 of the United States Code, inasmuch as Defendant is charged with violating Title 18, Section 924(e) of the United States Code.

The United States Court of Appeals for the 7th Circuit had jurisdiction of the Appeal from the District Court for the Central District of Illinois, Rock Island Division, pursuant to Title 28 of the United States Code, Sections 1291, 1294(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATUTES

Title 18 U.S. Code Section 924(e) is reprinted at PA 106.

Title 18 U.S. Code Section 922(g) is reprinted at PA 108.

Title 18 U.S. Code Section 3231 is reprinted at PA 109.

Title 28 U.S. Code Section 1254 is reprinted at PA 110.

Title 28 U.S. Code Section 1291 is reprinted at PA 110.

Title 28 U.S. Code Section 1294 is reprinted at PA 111.

Federal Rule of Evidence 404(b) is reprinted at PA 112.

## STATEMENT OF THE CASE

### Background in the District Court

Defendant was charged by way of Indictment with violation of Title 18 Section 924(e) of the United States Code in pertinent part alleging that he was a person in possession of a firearm which had previously travelled in foreign commerce, having been convicted previously of three violent felonies.

Defendant entered a Plea of Not Guilty to the Indictment on April 17, 1987, Timely Motion to Dismiss said Indictment was made premised upon the argument that Section 924(e) of Title 18 of the U.S. Code is a Sentencing Enhancement Provision and not a Substantive Offense for which Defendant could be found guilty. The Motion to Dismiss the Indictment was denied. In order to mitigate the harm which would flow from the Jury being ad-

vised of the nature of Defendant's three prior felonies, a Stipulation was entered into between the Defendant and the Government. The Defendant's Motion in Limine was granted. The Stipulation was marked as a Government's Exhibit, introduced into evidence, and read to the Jury. The Jury was instructed that it need not consider whether the Defendant had three prior violent felonies as that matter had already been agreed to between the Government and the Defendant.

## Decision of the United States Court of Appeals, Seventh Circuit

On Appeal, the United States Court of Appeals, Seventh Circuit, held that the inclusion of Section 924(e) in the Indictment was a miscitation. However, the language of the Indictment shows that this was not a miscitation but rather a charging of Section 924(e) of Title 18 of the

United States Code as a Substantive Offense.

CONFLICT AMONG THE CIRCUITS

Because of the divergence of the holdings among the various Circuits, it cannot be said whether Title 18 Section 924(e) of the United States Code is a Substantive Offense or a Sentencing Enhancement Provision. If it is determined that Title 18 Section 924(e) of the United States Code is a Sentencing Enhancement Provision, may the Government in its Indictment set forth a Defendant's three prior violent felonies as part of the offense which it seeks to prove at Trial? If the Government is not going to be allowed to place the language of Section 924(e) of Title 18 of the United States Code in its Indictment, how must it notify the Defendant that it is seeking Enhancement of the Sentence in the event of conviction for Violation of Title 18, Section

922(g), how does the Government prove the elements necessary for the Enhancement under Section 924(e) of Title 18 of the United States Code.

## REASONS FOR GRANTING THE WRIT

### I.

### THE UNITED STATES SUPREME COURT SHOULD ADDRESS THE DIVERGENCE OF OPINION AMONG THE VARIOUS CIRCUITS AS TO WHETHER OR NOT TITLE 18, SECTION 924(e) OF THE UNITED STATES CODE IS MERELY A SENTENCING ENHANCEMENT PROVISION, OR A SUBSTANTIVE OFFENSE FOR WHICH ONE MAY BE INDICTED.

The various Federal Appeals Courts have not provided the Defendant or the Government with sufficient guidance on this point, since the various Federal Circuits have rendered conflicting opinions regarding the nature of Section 924 (e) of Title 18 of the United States Code.

Typifying the extent of the conflict is the Sixth Circuit's recent reversal of its holding that Section 924(e) establishes a separate Federal offense. United States vs. Brewer, 853 Fed.2d 1319 (C.C.A. 1988); vacated and set aside after rehearing, 841 Fed. 2d 666.

The other Circuits which have held that Section 924(e) of Title 18 of the United States Code is a Sentence Enhancement provision are as follows:

The 3rd in the case of United States v. Hawkins, 811 Fed. 2d 210, 220, Cert. Denied 108 S. Ct. 110 (1987).

The 4th in the case of United States v. Blannon, 836 Fed.2d 843, 844-845, Cert. Denied 108 S. Ct. 1741 (1988).

The 7th in the case of United States v. Karlin, 852 Fed.2d 974; and United States v. Dickerson, No. 87-3138 Slip Op. at Pages 5-10, 7th Circuit, September 15, 1988.

The 8th in the case of United States v. Rush, 840 Fed. 2d 574, 576-578 (1988) in banc.

The 9th in the case of United States v. West, 826 Fed. 2d 909, 911 (1987).

The 10th in the case of United States v. Gregg, 803 Fed.2d 568, 570 (1986); Cert. Denied 107 S. Ct. 1379 (1987).

The District of Columbia in the case of United States v. Jackson, 824 Fed.2d 21,22-26 (1987); Cert. Denied 108 S. Ct. 506 (1988).

However, it must be noted that in some instances there have been forceful dissents.

On the other hand, the 5th Circuit has held that Section 924(e) of Title 18 of the United States Code creates a Separate Federal Offense, United States v. Davis, 801 Fed.2d 754, 755-56 (1986).

Because of the sharp division among the Circuits, Petitioner respectfully

submits that this Court must clarify the issue as to whether Section 924(e) of Title 18 of the United States Code is a Sentencing Enhancement Provision or a Substantive Offense. In the event this Court decides the law in question is a Sentencing Enhancement Provision, then this Court should give guidance as to how to properly charge the commission of the predicate offense and the Enhancement as called for by the law in question.

II.

THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO ADDRESS THE PROBLEM OF THE GOVERNMENT's APPARENT PRACTICE OF CHARGING IN AN INDICTMENT, WHAT IT CONCEDES IS A SENTENCING ENHANCEMENT PROVISION OF THE FIREARMS OWNER's PROTECTION ACT OF 1986, AS IF IT WERE A SUBSTANTIVE OFFENSE, THEREBY DENYING DEFENDANT's DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES;

AND WHAT PROCEDURES ARE CONSTITUTIONALLY MANDATED WHEN THE GOVERNMENT SEEKS ENHANCED SENTENCING FOR A DEFENDANT.

This case presents an opportunity for this Court to make it clear that Prosecuting Government Attorneys may not charge in an indictment a violation of Title 18, Section 924(e) of the United States Code as if it were a substantive offense.

If the Government is allowed to charge an Indictment in the language of Title 18, Section 924(e) of the United States Code, serious infringement to the Defendant's 5th Amendment rights under the United States Constitution occurs.

If an Indictment is properly brought under Title 18 Section 922(g) of the United States Code, the Indictment would not contain any references to a Defendant's prior felony convictions beyond the initial one required for the predicate offense. The matter of the Defendant's prior three vio-

lent felony convictions, if enhancement under Title 18 of the United States Code, Section 924(e) is sought, would be pertinent for the purpose of sentencing only, and not be matters which the Jury considers in their deliberation, either by Stipulation or evidence adduced in the course of the Trial.

The present case implicates the contradictions and possible confusion which arises when the Government asserts that Title 18 Section 924(e) of the United States Code is a Sentencing Enhancement Provision, but frames its Indictment as if said Statute creates a separate offense.

In various cases, the United States Government has conceded from time to time that Title 18, Section 924(e) of the United States Code is a Sentencing Enhancement provision rather than a Substantive Offense. Slip Opinion 888-1289 issued October 17, 1988, in the instant case at

page 9 thereof. This is a position the Government has stated with some consistency, U.S. v. Rush, 840 Fed.2d 574,576 (C.A.8th, 1988); United States v. Jackson, 824 Fed.2d 21, 23 (D.C. Cir. 1987) Cert. Denied 108 Supreme Court 406 (1988); United States v. Davis, 801 Fed.2d 754,756 (C.A. 5th 1986). What is not consistent with this position is the Government's apparent practice of indicting felons under Title 18, Section 924(e) as if it were a Substantive Offense. United States v. Pirovolos, 844 Fed.2d 415 (C.A. 7th 1988) and United States v. Gillies, 851 Fed.2d 496 (1988).

When the Government is allowed to charge the Indictment in the language of Title 18, United States Code Section 924 (e), the Defendant is unduly prejudiced and denied his rights under the Due Process Clause of the 5th Amendment to the United States Constitution. If Section

924(e) is treated as anything other than a Sentencing Enhancement Provision, or if the language of Section 924(e) is included in the charged indictment, there is inherent prejudice to the Defendant in that the Jury is made aware of the Defendant's three prior violent felony convictions. If the provision of Section 924(e) are treated as a Substantive Offense, then the facts surrounding the three prior violent felony convictions will be submitted to the Jury for its deliberation in determining whether the offense presently being considered has been proven beyond a reasonable doubt.

The Government's apparent practice of charging the Indictment in the language of Section 924(e) by asserting that the Defendant has three prior violent felony convictions is significantly troubling. The danger inherent in submitting evidence of Defendant's prior convictions to a Jury

needs little explanation. Under Federal Rule of Evidence 404(b) the Trial Court must be wary in admitting evidence relating to a Defendant's prior criminal conduct unless the evidence is narrowly circumscribed for a limited purpose. The rationale behind the rule is simple: A Jury may be willing to convict a Defendant based upon the assumption that the Defendant was acting in conformity with past misconduct rather than upon the Government's proof beyond a reasonable doubt that the Defendant committed the offense charged. United States v. Bailleaux, 685 Fed.2d 1105, 1109 (9th Cir. 1982).

Even if the Defendant stipulates to his three prior violent felonies and is successful in his Motion in Limine, the Jury still knows of the three prior violent felonies because the Government will read the Stipulation to the Jury and the Court will instruct the Jury that it need

not find that the element of the offense has been proved beyond a reasonable doubt since the Defendant already admits this; or, in the alternative, if the Defendant does not Stipulate to his three prior violent felonies, the Government will introduce evidence of the three prior violent felonies as part of its proof in its case in chief.

III.

THIS COURT SHOULD DETERMINE THE REACH OF TITLE 18, SECTION 924(e) OF THE UNITED STATES CODE IN ORDER TO DETERMINE THE INTENT OF CONGRESS SO AS TO DEFINE THE AMBIT OF SAID CRIMINAL STATUTE.

In Interpreting the reach of a criminal statute a reviewing Court is to determine the intent of Congress as reflected in the language, structure, and legislative history of the Statute. If it is determined that the language of Title 18,

Section 924(e) of the United States Code is ambiguous as respects whether the statute is a Substantive Offense or a Sentencing Enhancement, then the rule of lenity requires that the Statute be strictly construed in favor of the Defendant. United States v. Turkette, 452 U.S. 576, 587 (Note 10 (1981) and United States vs. Bass, 404 U.S. 336, 350 (1971).

If the Statute is strictly construed in favor of the Defendant and his Due Process rights, then the issue of his three prior violent felonies should not be brought out as part of the Government's case in Chief. The Government should be restricted to proof of the issues of the Substantive Offense as set out at Title 18 United States Code Section 922(g). It is much easier to safeguard the Defendant's rights if we are talking about one prior as opposed to three prior violent felonies.

The Government cannot be allowed to give lip service to the fact that Title 18 Section 924(e) of the United States Code is a sentencing Enhancement Provision, but interject matters relating to said Sentencing Provision to the Jury, which is to have no concern for matters relating to Sentencing, as Finders of the Facts.

The Government should charge in the language of the substantive offense set out at Title 18 Section 922(g) of the United States Code, and if the Jury finds the Defendant Guilty, then proceed to the issue of Enhancement of Sentence under 924(e) of Title 18 of the United States Code. If the Defendant disputes he has three prior violent felonies, the Jury can then be presented with the facts relating to the three prior violent felonies. Of course, when the Indictment is filed, the Government can advise the Defendant if convicted of violation of 922(g) that

Enhancement will be sought under 924(e) of Title 18 of the United States Code.

## CONCLUSION

For each and all of the reasons stated, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals, Seventh Circuit.

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December 17, 1988

# PETITIONER'S APPENDICES

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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NO. 88-1289

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DARRELL I. LOWE,

Defendant-Appellant.

---

Appeal from the United States District Court for the Central District of Illinois, Rock Island Division.

No. 87-40006-Michael H. Mihm, Judge

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Argued June 14, 1988-DECIDED

October 17, 1988

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BEFORE CUDAHY, FLAUM and MANION,
Circuit Judges

FLAUM, Circuit Judge. A grand jury indicted Darrell I. Lowe for being a convicted felon in possession of a firearm which had traveled in interstate commerce. 18 U.S.C. Sec. 922(g). The one-count indictment also alleged that Lowe had three previous state court convictions for violent felonies in violation of 18 U.S.C. Sec. 924(e). Lowe appeals his subsequent conviction after a jury trial, claiming that the indictment failed to charge an offense under Sec. 922(g). He also argues that the indictment was constructively amended by the jury instructions which impermissibly broadened the original charge. For the reasons stated below, Lowe's conviction is affirmed.

I.

On the evening of January 4, 1987, the police for Rock Island, Illinois were called to the Katydid Tavern to break up a bar fight. The officers dispatched to the tavern were informed that one of the disputants might be armed with a handgun. When the police arrived, they observed Lowe arguing with another patron. After breaking up the fray, the officers frisked Lowe and found a .22 caliber revolver stuck in his belt. Lowe was arrested and ultimately charged on April 8, 1987 in a one-count indictment which alleged that he:

> did knowingly possess a firearm which had previously traveled in interstate commerce, to wit: a Liberty .22 caliber revolver with an obliterated serial number, the defendant having been

previously convicted three times under the laws of the State of Illinois for felony crimes of violence.

In violation of United States Code, Title 18, Section 924(e).

Lowe moved to dismiss the indictment on numerous grounds, including the contention that 18 U.S.C., Sec. 924(e) is a sentence-enhancement provision for the predicate offense of felony firearm possession in Sec. 922(g) rather than a separate substantive offense.[1] When the trial court denied the motion to dismiss, Lowe stipulated to the fact that he had three prior state court convictions for the purposes of Section 924(e), and successfully moved *in limine* to prevent the government or any of its witnesses from mentioning the felonies at trial.

At trial, the government sought to prove the interstate character of the .22 caliber revolver through the testimony of Richard Graze, a firearms enforcement officer from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. The government qualified Craze as an expert on firearms identification and classification, and he testified that the gun in Lowe's possession was manufactured in West Germany and was imported into the United States by the Liberty Arms Corporation located in Montrose, California. Over the objection of defendant, Craze also testified that, in his opinion, the location of the manufacturer and importer of the firearm indicated that it had traveled in interstate commerce.

At the conclusion of the trial, the jury was given the following instructions, again over Lowe's objection, on the commerce nexus necessary for a conviction under Sec. 922(g):

> The term "interstate" or "foreign commerce" includes commerce between any place in the state and any place outside of that state or any possession within the possessions of the United States or the District of Columbia, but such term does not include commerce between places within the same state but through any place outside of the state.
>
> * * * * * *
>
> "Commerce" means travel, trade, traffic, commerce, transportation or communication among the

several states. If you do not find beyond a reasonable doubt that the firearm had traveled in interstate commerce, then the government has not met its burden of proof on this issue, and you must find the defendant not guilty.

The government may meet its burden of proving that the firearm had previously traveled in interstate commerce if it is demonstrated that the firearm possessed by a convicted felon had previously traveled from one state to another.

The jury returned a guilty verdict and the trial court entered judgment on February 4, 1988.[2] Lowe moved to arrest the judgment and for a new trial, again claiming that it was improper to charge a violation of 18

U.S.C. Sec. 924(e) as if it were a substantive offense.[3] The court denied these motions and subsequently sentenced Lowe to a term of fifteen years without parole pursuant to the mandatory provisions of Sec. 924(e)(1). Thereafter, Lowe timely filed a Notice of Appeal.

II.

Lowe's initial claim is that the Indictment failed to state an offense under 18 U.S.C. Sec. 922(g). Specifically, Lowe contends that the charge in the indictment that he possessed "a firearm which had previously traveled in interstate commerce", is not the same as the offense of possessing a firearm "in or affecting commerce", the language employed in Sec. 922(g).[4] He also argues that, for the purpose of Sec. 922(g), "commerce" is a separate and distinct concept

from "interstate commerce". As part of this claim, Lowe adds that the government failed to establish the necessary jurisdictional nexus between commerce and the firearm in his possession. Based upon our review of the indictment and the evidence adduced at trial, we conclude that each of these contentions is without merit.

Lowe's initial argument is, in all respects, a challenge to the technical sufficiency of the indictment.[5] To evaluate this claim, we must read the indictment as a whole to determine whether all of the elements of the charged offense are alleged. This requirement is designed to ensure that the accused is adequately apprised of the charges so that he or she can prepare a proper defense. United States v. Olson, 846 F.2d 1103, 1115 (7th Cir. 1988). In determining whether

the essential elements of the offense are sufficiently stated, however, it is not necessary that any particular words or phrases be used. United States v. Garcia-Geronimo, 633 F.2d 738, 742 (7th Cir. 1981) (citing United States v. Weatherspoon, 581 F.2d 595, 600 (7th Cir. 1978)); nor is it necessary that the indictment track the exact language of the statute as long as each element of the offense is alleged in a form which substantially states it. Weatherspoon, 581 F.2d at 600 (citing Hagner v. United States, 285 U.S. 427, 433 (1932)). Under the foregoing principles, we are persuaded that a reasonable construction of the charging language - that Lowe possessed a firearm "which had previously traveled in interstate commerce" - substantially stated the essential element of possession "in or affecting

commerce". 18 U.S.C. Sec. 922(g).

The conclusion, which is bottomed on a simple reading of both the indictment and statute, is fortified by the Supreme Court's interpretation of the commerce element of 18 U.S.C. Sec. 1202(a), the statutory forerunner of Sec. 922(g). See United States v. Gillies, 851 F.2d 492, 494-95 (1st Cir. 1988). In Scarborough v. United States, 431 U.S. 563 (1977), the Court began its interpretation of the "in or affecting commerce" phrase of Sec. 1202(a) by reaffirming that Congress is aware of the "distinction between legislation limited to activities 'in commerce' and an assertion of its full range of Commerce Clause powers so as to cover all activity substantially affecting interstate commerce". Id at 571. The Court went on to review the legislative history

of Sec. 1202(a) and concluded that Congress sought to reach the possession of firearms broadly,[6] especially since it could find "no indication that Congress intended to require any more than the minimal nexus that the firearm had been, at some time, in interstate commerce". Id. at 575. See also United States v Barlin, 852 F.2d 968, 974 (7th Cir. 1988). The Court's interpretation of the statute's breadth makes it clear that, for the purpose of Sec. 922(g), a charge that a firearm "previously traveled in interstate commerce" sufficiently states the commerce element of the offense. Gillies, 581 F.2d 723, 726 & n.4 (8th Cir. 1978). This conclusion also renders meritless Lowe's contention that "commerce" is a separate and distinct concept from "interstate commerce". We therefore conclude

that the indictment as a whole sufficiently stated the elements of the firearms possession charge.

Similarly, we find Lowe's sufficiency of the evidence claim on the interstate commerce nexus to be without merit. It is firmly established that, under Sec. 922(g), proof of a gun's manufacture outside of the state in which it was allegedly possessed is sufficient to support the factual finding that the firearm was "in or affecting commerce". United States v. Gourley, 835 F.2d 249, 251 (10th Cir. 1987)(proof of manufacture in Spain sufficient); United States v. Clawson, 831 F.2d 909, 913 (9th Cir. 1987) (proof of manufacture in Germany sufficient); United States v. Gregg, 803 F.2d 568, 571 (8th Cir. 1986) (proof of manufacture in another state sufficient). In the present case,

the government's firearms expert not only testified that the gun in Lowe's possession was manufactured in Germany and imported through California, he stated that, in his opinion, the firearm had traveled in both foreign and interstate commerce. We conclude that Lowe has failed to carry the "heavy burden" that must be shouldered under a sufficiency of the evidence claim. United States v. Bruun, 809 F.2d 397, 408 (7th Cir. 1987) (the verdict must stand unless the record contains no evidence, regardless of how it is weighed, from which the jury could find guilty beyond a reasonable doubt.)

III.

Lowe's second claim on appeal is that the indictment was effectively amended by the trial court's jury instructions on the commerce nexus

required for a conviction under Sec. 922(g), Lowe relies heavily upon Stirone v. United States, 361 U.S. 212 (1960), for support of this contention. In its brief, the government seeks to distinguish Stirone by arguing that "only one violation of the Armed Career Criminal Act [18 U.S.C. Sec. 924(e)(1)] was alleged and proven". Appellee's Brief at 12. In his reply brief, Lowe responds to the government's contention reasserting his argument made to the district court that it was error to indict him under Sec. 924(e)(1) because it is a sentence-enhancement provision rather than a substantive offense. Appellant's Reply Brief at 2. This latter contention raises a more substantive issue[7] that has generated substantial disagreement among the federal circuits. Nevertheless, it is incumbent upon this court to first

consider whether the matter is properly before us in this appeal, or whether the argument was waived when Lowe did not raise it in his main brief.

As a general rule, this court will not consider issues raised for the first time in a reply brief. Taylor v. Peabody Coal Co., 838 F.2d 227, 229 (7th Cir. 1988); Shlay v. Montgomery, 802 F.2d 918, 922 n.2 (7th Cir. 1986). In reaffirming this principle, we have referred counsel to the twin directives in Rule 28 of the Federal Rules of Appellate Procedure (appellant's initial brief must include a statement of the issues) and Seventh Circuit Rule 28(e) (the reply brief shall be limited to matter in reply). In Re Bear, 789 F.2d 577, 579 (7th Cir. 1986).

However, we have also recognized that these two rules give rise to an exception which we will now more appropriately label as a corollary. "Where an appellee raises an argument not addressed by the appellant in its opening brief, the appellant may reply." Bennett v. Tucker, 827 F.2d 63, 69 n.2 (7th Cir. 1987) (citing Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 359 (7th Cir. 1987) (opinion of Posner J.)). This corollary is largely aimed at securing a level of fairness that might otherwise be lost under a one-sided application of the waiver rule. The invocation of the corollary in the present case is therefore fitting to the extent that the government sought to rely on an issue which Lowe fully preserved by his pre-trial and post-trial motions, yet neglected or chose not to argue on

appeal. We also note that, because the issue involves a matter of statutory interpretation, concerns about our limited role as an appellate court do not counsel against addressing the matter. We thus proceed to address the substantive nature of 18 U.S.C. Sec. 924(e).

At oral argument, the government stated that its position is in fact that Sec. 924(e) is a sentence-enhancement provision rather than a substantive offense.[8] This is a position it has stated with some consistency. See e.g. United States v. Rush, 840 F.2d 21, 23 (D.C. Cir. 1987) cert. denied, 108 S.Ct. 506 (1988); United States v. Davis, 801 F.2d 754, 756 (5th Cir. 1986). What is not consistent with this position is the government's apparent practice of indicting felons under Sec. 924(e) as if it were a

substantive offense. See e.g. Gillies, 851 F.2d at 496; United States v. Pirovolos, 844 F.2d 415 (7th Cir. 1988).

Admittedly, the federal courts have not provided the government with sufficient guidance on this point since the circuits have rendered conflicting opinions on the substantive nature of Sec. 924(e). Typifying the extent of the conflict is the Sixth Circuit's recent reversal of its conclusion that Sec. 924(e) establishes a separate federal offense. United States v. Brewer, 853 F.2d 1319 (6th Cir. 1988) vacating and setting aside after rehearing, 841 F.2d 667, 668-69 (6th Cir.). As for the other circuits, the Third, Fourth, Eighth, Ninth, Tenth and District of Columbia Circuits have all concluded that Sec. 924 is a sentence

enhancement provision, but in some instances, have generated forceful dissents in doing so. United States v. Gregg, 803 F.2d 568, 570 (10th Cir. 1986), cert. denied 107 S.Ct. 1379 (1987); United States v. Hawkins, 811 F.2d 210, 220 (3d Cir.) cert. denied, 108 S.Ct. 110 (1987); United States v. Jackson, 824 F.2d 21, 22-26 (D.C. Cir. 1987), cert. denied, 108 S.Ct. 506 (1988); United States v. West, 826 F.2d 909, 911 (9th Cir. 1987); United States v. Blannon, 836 F.2d 843, 844-45 (4th Cir.) cert. denied, 108 S.Ct. 1741 (1988). The Eighth Circuit reached its conclusion after considering the matter en banc. United States v. Rush, 840 F.2d 574, 576-78 (8th Cir. 1988) (en banc). Finally, subsequent to the oral argument in the present case, this circuit held that Sec. 924(e) is a sentence-enhancement provision.

United States v. Karlin, 852 F.2d at 972 (citing Pirovolos, 844 F.2d at 420-21); United States v. Dickerson, No. 87-3138 slip op. at 5-10 (7th Cir. Sept. 15, 1988). On the other hand, the Fifth Circuit has concluded that Sec. 924(e) creates a separate federal offense. United States v. Davis, 801 F.2d 754, 755-56 (5th Cir. 1986).

Our opinion in Dickerson emphasized the double jeopardy problems arising from a concurrent sentence under both Sec. 922(g) and Sec. 924(e). Because the present case implicates the contradiction and possible confusion arising from the government's assertion that Sec. 924(e) is a sentence-enhancement provision and its practice of indicting defendants as if the statute creates a separate offense, we respectfully underscore a number of the points advanced in Dickerson concerning the substantive nature of Sec. 924(e).

In interpreting the reach of a criminal statute, the purpose of this court's review is to determine the intent of Congress as reflected in the language, structure, and legislative history of the statute. Garrett v. United States, 471 U.S. 773, (1985). If these manifestations of Congressional intent are ambiguous, leaving us unable to define the ambit of the criminal statute, the Rule of Lenity requires that we strictly construe the statute in favor of the defendant. United States v. Turkette, 452 U.S. 576, 587, n. 10 (1981). As explained by the Supreme Court, the Rule of Lenity comes into play only "when choice has to be made between two readings of what conduct Congress has made a crime". United States v. Bass, 404 U.S. 336, 350 (1971). It requires that Congress speak in language that

is clear and definite before a court may choose the harsher of the alternatives present.[9] Id. Because of our conclusion that the intent of Congress as to the nature of Sec. 924(e) is unambiguous, we need not employ this doctrine of last resort. Russello v. United States, 464 U.S. 16, 29 (1983).

Much of the conflict over the nature of the Armed Career Criminal Act of 1984 (ACCA) originally codified at 18 U.S.C. Sec. 1201(a)(1), arose prior to Congress' recent repeal and re-enactment of its provisions in Secs. 922(g) and 924(e)(1), Firearms Owners Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 456 (1986). See H.R. Rep. No. 99-945, reprinted in 1986 U.S. Code Cong. & Admin. News 1327, 1349-52. By recodifying the ACCA, Congress has settled much of the disagreement over the nature of Sec. 924(e) by restruc-

turing the Act to reflect what the Fifth Circuit has called "the common indicia of sentence-enhancement provisions". Davis, 801 F.2d at 756 (citing Garrett, 471 U.S. at 782). The Davis court surmised that such "common indicia" include a title indicating that the statute is a sentence-enhancement provision, an explicit reference in the statute to the necessary conviction under the predicate provision, a penalty derived as a multiplier of other offenses, and procedures for a sentencing hearing. Davis, 801 F.2d at 756.

In its present form, Sec. 924(e) contains a number of these characteristics. For example, the first half of Sec. 1202(a), which makes it unlawful for a class of prohibited persons, such as previously convicted felons, to ship, transport, or possess a firearm,

was recodified under the "Unlawful Acts" subtitle of Sec. 922(g)(1). On the other hand, the second half of 1202(a)(1), the mandatory sentencing provisions here at issue, were moved to the "Penalties" subtitle of 18 U.S.C. Sec. 924. Dickerson, No. 87-3138, slip op. at 6. Additionally, Congress changed the language of 924(e) so that it now specifically refers to "the case of a person who violates Sec. 922(g) of this title and has three previous convictions by any court referred to in Section 922(g)(1) of this title for a violent felony or a serious drug offense, or both....". The statute then goes on to mandate the sentence of a fine of not more than $25,000 and imprisonment without eligibility for parole for "not less than fifteen years....". 18 U.S.C. Sec. 924(e)(1).

From this structure, it is clear that the mandatory sentencing provision of Sec. 924(e) is applicable only after the defendant has been convicted of one of the predicate offenses enumerated in Sec. 922(g). The requirement that a defendant have three prior convictions for serious drug offenses or violent felonies, as defined in Sec. 922(g), causes the statute to closely resemble a recidivist provision. Dickerson, No. 87-3138, slip op. at 6; Jackson, 824 F.2d at 24. In fact, the only perceptible difference between Sec. 924(e) and a more traditional recidivist statute is Congress' conclusion that a certain class of repeat felons should be subject to an enhanced sentence when they commit the prohibited act of shipping, transporting, or possessing a firearm, rather than the same underlying offense

or offenses. Significantly, the legislative history of the ACCA reveals that this difference was intended and is a function of Congress' aim of subjecting "career criminals" - that small number of repeat offenders responsible for an inordinate percentage of the nation's 25 million crimes of theft or violence - to federal prosecution without radically expanding federal jurisdiction over common law crimes. See e.g. 130 Cong. Rec. H 10550 (daily ed. Oct. 1, 1984) Statements of Rep. Hughes and Rep. Sawyer). In light of this intent, we do not perceive the structural variation in Sec. 924(e) to be a difference in kind from a statute enhancing the penalty for an ofender who repeats the same offense. United States v. Neary, 552 F.2d 1184, 1194 (7th Cir.) Cert. denied, 434 U.S. 864 (1977) (under a recidivist statute, the determination

of prior convictions is independent of the conviction for the substantive offense and subjects the defendant to increased penalty. Finally, it is instructive to note that, under traditional sentencing procedures, proof of a defendant's prior felonies is the type of individual background information considered by a judge in sentencing a defendant. See Government of Virgin Islands v. Castillo, 550 F.2d 850, 853 n. 5 (3d Cir. 1977). It is not the type of factual determination for which our juries are best suited or one they are ordinarily asked to make. Without a more definitive direction from Congress, we are unwilling to presume such a radical departure from these traditional roles.

As it is presently codified then, Sec. 924(e) contains a sufficient number of the "common indicia"

of a sentence-enhancement provision to persuade us that Congress intended to create just that. Contra Davis, 801 F.2d at 756; Rush, 840 F.2d at 577 (Gibson, J. dissenting); Hawkins, 811 F.2d at 224 (Rosenn, J. concurring in part and dissenting in part). In making this observation, however, we do not presume, as the Fifth Circuit seemingly has, that all sentence-enhancement provisions will necessarily have the exact same structure and characteristics. Compare 18 U.S.C. Sec. 3573, Increased Sentence for Dangerous Special Offender, with 21 U.S.C. Sec. 848, Continuing Criminal Enterprise, and 21 U.S.C. Sec. 849, Dangerous Special Drug Offender Sentencing. In that regard, Congress' failure to establish a separate sentencing hearing procedure in Sec. 924(e) for the consideration of a defendant's prior

felony convictions is not dispositive of whether the statute is a sentence-enhancement provision. Although Congress' oversight on this score may make the ACCA less comprehensive as a sentence-enhancement provision, the omission does not render the statute a separate offense. Contra Rush, 840 F.2d at 579 (Gibson, J. dissenting).

Finally, we must consider the conclusion of the dissenting judge in Hawkins, 811 F.2d at 223-25, and Brewer, 853 F.2d at 1327-29, that the mandatory sentencing structure of Sec. 924(e) renders it a separate offense under the Supreme Court's reasoning in McMillan v. Pennsylvania, 477 U.S. 79, (1986). In McMillan, the Court was faced with a constitutional challenge to the Pennsylvania's Mandatory Minimum Sentencing Act ("MMSA"). The MMSA required the imposition of a five-year

minimum sentence of the trial judge found that the defendant "visibly possessed a firearm" during the commission of one of the felonies enumerated in the statute. The issue pressed by the petitioners was whether the visible possession factor was an element of the offense, thus requiring proof beyond a reasonable doubt under Mullany v. Wilbur, 421 U.S. 684 (1975). A majority of the McMillan Court concluded, however, that the visible possession finding was a sentencing factor governed by its subsequent holding in Patterson v. New York, 432 U.S. 197 (1977). The Court stressed that in Patterson, it had "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact', the State must prove that fact

beyond a reasonable doubt". McMillan, 477 U.S. at 84 (quoting Patterson, 432 U.S. at 214). In reaching its conclusion that Patterson governed the case before it, the Supreme Court observed that:

> Petitioner's /sic/ claim that visible possession under the Pennsylvania statute is "really" an element of the offense for which they are being punished - that Pennsylvania has in effect defined a new set of upgraded felonies - would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment ... but it does not ... it /raises the ante for the defendant/ only in the way we have previously mentioned, by raising the minimum sentence that

may be imposed by the trial court. McMillan, 477 U.S. at 88 (emphasis added).

In interpreting Sec. 924(e), the dissenting judges in Brewer and Hawkins placed considerable stress on a portion of the Court's "greater or additional punishment" statute to "require proof beyond a reasonable doubt of a fact that increases the punishment beyond the minimum set by the legislature for the other elements of the offense". Brewer, No. 86-6155, slip op. at 19 (Merritt, J. dissenting). With that point in hand, they concluded that Sec. 924(e) establishes a separate offense because "the prison sentence imposed exceeds the maximum prison sentence permitted for the crime charged in the indictment". Id. See also Hawkins, 811 F.2d at 223-24 (Rosenn, J. concurring in

part and dissenting in part).

This rather selective reading of McMillan has engendered sharp criticism. See Brewer, 841 F.2d 667, 676 (Krupansky, J. dissenting), vacated and set aside after rehearing, 853 F.2d at 1319 (6th Cir. 1988) (majority extrapolates a cannibalized passage from McMillan .... which did not even rise to the level of dicta"); Field v. Sheriff of Wake County, North Carolina, 831 F.2d 530, 536 (4th Cir. 1987) (minimum/maximum analysis "alone did not form a basis of the Court's opinion"). Based upon our understanding of McMillan, we also believe that the Court's "greater or additional punishment" analysis was not intended to be the sole test for measuring whether a sentencing factor becomes an element of the offense. The McMillan Court made it clear that it

was unable to lay down a bright line test for such statutes; the result being that the constitutionality of these statutes will necessarily turn on differences in degree. Furthermore, the Court specifically stated that Pennsylvania's act of taking one factor that has always been considered by sentencing courts to bear on punishment and dictate "the precise weight to be given that factor if the instrumentality is a firearm ... has not transformed against /Pennsylvania's/ will a sentencing factor into an element of some hypothetical 'offense' ". McMillan, 477 U.S. at 89-90. Finally, we believe that the reading of McMillan pressed by the dissenting judges in Brewer and Hawkins does not conform to the Supreme Court's understanding of the dictates of the due process clause.

> Mullany's holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend upon the presence or absence of that fact, as the case may be, beyond a reasoanble doubt. In our view, the Mullany holding should not be so broadly read.

Patterson, 432 U.S. at 214 See also McMillan, 477 U.S. at 84.

While it is obvious that Sec. 924(e) links the severity of a defendant's punishment to the type and number of his or her prior convictions, we do not believe that reliance upon such historical facts in this statutory scheme impermissibly transcends the boundaries of the due process clause. Section 924(e) in no way relieves the

prosecution of its burden of proving beyond a reasonable doubt all of the elements of the predicate possession offense. The Fifth Circuit's explanation of the operation of a similar recidivist statute is particularly fitting.

> Such statutes are, and have historically been, generally recognized as sentencing statutes, not as separate offense statutes. They plainly involve no legislative attempt to evade constitutional rights. Moreover, they have no relation to the circumstances of the wrongdoing constituting the most recent offense, but rather to something which is wholly unrelated thereto. Further, they do not relate to determining what the accused has done, but rather what the State has pre-

> viously determined that he has done. And that previous determination must have been a formal, judicial determination of guilt; and hence, one as to which the full measure of constitutional protections was available. The scheme of the statutes, therefore, cannot be properly understood as intended or calculated to infringe on the right attending determination of whether the accused has engaged in criminal conduct.

Buckley v. Butler, 825 F.2d 895, 903 (5th Cir. 1987), cert. denied, 108 S.Ct. 1738 (1988).

The legislative history of the Armed Career Criminal Act lends further support to our conclusion that a common-sense interpretation of the current wording and structure of Sec.

924(e) reveals Congress' intent to create a sentence-enhancement provision rather than a separate substantive offense. Dickerson, No. 87-3138, slip. op. at 6. See also Brewer, 853 F.2d at 1325; Rush, 840 F.2d at 576 n. 6.

In its nascent stages, the ACCA was intended by Congress to create a new federal offense for armed burglary or robbery by a defendant with two or more prior convictions. The very first version of the ACCA was passed by both Houses of Congress in 1982 and submitted to the President as part of a comprehensive seven-part crime package. When the President pocket vetoed this package, the ACCA was reintroduced as S. 52 and H.R. 1627. The Senate Report accompanying its version of the Act made clear that "(t)he bill creates a new Federal crime of carrying a firearm during the commission of a robbery or

burglary..." S. Rep. No. 190, 98th Cong. 1st Sess. 3 (1983). Similarly, a subsequent House Report echoed that "H.R. 1627 would make it a Federal offense for a defendant to commit any robbery or burglary with a firearm if such defendant had been convicted two or more times previously of a robbery or burglary under either Federal or State laws". H.R. Rep. No. 1073, 98th Cong. 2d Sess. 4 reprinted in 1984, U.S. Code Cong. & Admin. News p. 3182 at 3664.

As both Houses of Congress considered the ACCA, a number of legislators raised considerable concern over extending federal jurisdiction into matters of state law and prerogative. H.R. Rep. No. 1073 at 4 U.S. Code and Admin. News, 1984, 3664 (questions as to the need for federal prosecution of local robberies and bur-

glaries and coordination of such efforts with local District Attorneys notwithstanding career criminal problem). The basic Federalism concerns prompted by S. 52 and H.R. 1627 were answered by Representative Hughes, who offered a substitute bill which linked federal jurisdiction to the interstate commerce character of the firearm used by the defendant. This bill required a federal prosecutor to "show that a firearm has previously traveled in interstate commerce to establish Federal jurisdiction". The House Report goes on to explain that:

> "In 'enhancing'this offense /Sec, 1201(a)/ with H.R. 1627-type sanctions, if the defendant has been convicted three times of robbery or burglary, we are 'enhancing' an existing Federal crime, which would alleviate

> many of the problems associated with H.R. 1627 such as the issue of a local D.A. veto or the difficulties encountered by Federal courts in applying State robbery and burglary laws in Federal prosecution.

H.R. Rep. No. 1073 at 5 U.S. Code & Admin. News, 1984, 3665 (emphasis added). In the floor debates that followed, Representiative Hughes clarified his intent in sponsoring the amendment to the bill that ultimately became the ACCA of 1984:

> H.R. 6284 which we have before us is another and, I believe, useful approach to this problem. This bill would enhance the sanctions of 18 U.S.C. Sec. 1202(a) with a 15-year minimum sentence if the defendant has been convicted three times of felonies for robbery or

burglary.

130 Cong. Rec. H. 10550 (daily ed. Oct. 1, 1984) (Statement of Rep. Hughes) (emphasis added). The sentence enhancement intentions of Representative Hughes were reiterated by Representative Sawyer.

> The proposal before us today is crafted to avoid the federal prosecution of State burglary or robbery charges. This proposal does not even expand Federal criminal law. H.R. 6248 takes an existing gun possession statute and enhances the penalty for any violation by a person having been previously convicted three times of armed burglary or robbery.
>
> H.R. 6248 would apply the enhanced penalties of a fine not more than

> $25,000 or imprisonment of not less than 15 years, or both, in addition to the penalties for the underlying offense. These penalties would be applied to anyone possessing a firearm in violation of Sec. 1202(a) to title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. App. 1202(a)). This person must have three previous convictions for burglary or robbery.

130 Cong. Rec. H. 10550-51 (daily ed. Oct. 1, 1984)(Statement of Rep. Sawyer) (emphasis added). Senator Spector, the Senate sponsor of the ACCA, also highlighted his understanding of the amended bill during the Senate floor debates:

> This bill would create no new Federal crime. Under present section 1202(a), possession of a

> firearm by a convicted felon is already a Federal crime, with a maximum prison sentence of 2 years. This title would simply provide for a stiffer sentence for career criminals.

130 Cong. Rec. S. 13080 (daily ed. Oct. 4, 1984) (Statement of Sen. Spector) (emphasis added).

These statements of members of both Houses of Congress reflect an intent to ultimately create in the ACCA a sentence-enhancement provision. In reaching the opposite conclusion, the Fifth Circuit and the dissenting judges in Hawkins and Brewer overlooked the Federalism concerns raised by certain legislators relative to S. 52 and H.R. 1627, and isolated one conflicting statement in the House Report on the ACCA to support their position.[10]

Such an expansive reading of one paragraph of the House Report is too thin a reed to support the view that the ACCA creates a separate federal offense.

Having concluded that 922(g) was intended by Congress to be a sentence-enhancement provision, we turn to Lowe's argument that it was error to indict him under the statute as if it was a separate offense. Two aspects of the indictment are implicated in this argument. The first is the final line of the indictment alleging that Lowe violated "Section 924(e) Under Rule 7(C) of the Federal Rules of Criminal Procedure, a miscitation such as the reference to Sec. 924(e) is harmless error and cannot be grounds for dismissing the indictment or reversing the conviction unless the defendant is mislead by the erroneous reference

and prejudiced thereby." United States v. Hutchenson, 312 U.S. 219, 229 (1941); United States v. Garner, 529 F.2d 962 (6th Cir.) cert. denied, 426 U.S. 922 (1976). It is apparent from the content of Lowe's pre-trial motions that the indictment created no such notice problem for him or his counsel.

The reference in the indictment to Lowe's three prior felony convictions, however, is significantly more troubling. The danger inherent in submitting evidence of a defendant's prior convictions to a jury needs little explanation. Under Federal Rule of Evidence 404(b), one of the clearest statements of this concern, a trial court must be chary in admitting evidence relating to a defendant's prior criminal conduct unless the evidence is narrowly circumscribed for limited purposes.[11] The rationale

behind Rule 404(b) is simple: a jury may be willing to convict a defendant based on the inference that he or she was acting in conformity with past misconduct rather than upon the government's proof beyond a reasonable doubt that defendant committed the offense charged. United States v. Bailleaux 685 Fed.2d 1105, 1109 (9th Cir. 1982).

Although it takes little effort to envision the type of circumstances in which reference to a defendant's prior felonies would actually prejudice the accused and merit reversal of the conviction under Sec. 922(g), Lowe's case does not present such a circumstance.[12] Accord Castillo, 550 F.2d at 855. Actual prejudice occurs if an "error had substantial and injurious effect or influence in determining the jury's verdict". United States v.

Lane, 474 F.2d 438, 449 (1986) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946). Based on our review of the trial record, we conclude that the limited references to Lowe's prior convictions were so narrowly circumscribed that the error at trial was harmless.

To begin with, Lowe's stipulation to the three previous convictions for the purpose of Sec. 924(e) and his successful Motion in Limine to prevent any mention of the convictions at trial kept the jury from ever hearing anything about the types of previous crimes Lowe had committed. Thus, the degree of prejudice that might normally stem from a more detailed explanation of the type of crimes involved is absent in this case. Additionally, the jury was instructed that the stipula-

tion to Lowe's prior convictions constituted an agreement between the parties about one of the elements of Sec. 924(e) and that the jury did not need to determine the matter. Finally, the uncontradicted evidence of Lowe's guilt of violating the predicate firearm possession offense was overwhelming. Lowe presented no evidence or witnesses on his behalf. The government, on the other hand, supported each element of its case with the testimony of one or more witnesses. For example, the bartender at the Katydid Tavern testified about the fray between Lowe and another patron and her telephone call to the police. She also stated that she observed the police search Lowe and recover a gun. Correspondingly, each of the three officers involved in Lowe's arrest testified about searching Lowe and

finding a .22 caliber revolver stuck in the back of his belt. As we noted in Part I, supra, the government presented expert testimony sufficient to establish the interstate character of the firearm, which was put into evidence as an exhibit. In light of this evidence, we are able to say "with fair assurance, after stripping away the erroneous action from the whole, that the judgment was not substantially swayed by the error". Pirovolos, 844 F.2d at 421 (upholding defendant's conviction for felony possession of a firearm in violation of Sec. 922(g) against a challenge to erroneous admission of prior felonies). Accordingly, the judgment of the district court is AFFIRMED.

Footnotes:

1. In his Motion to Dismiss, Lowe

specifically stated that:

The indictment does not charge any violation of the laws of the United States of America as to the defendant, Darrell I. Lowe, in that Section 924(e) does not contain a substantive offense of which a person can be found guilty; but rather is a sentence-enhancement provision and a person cannot be deemed guilty of having violated a provision relating to sentencing.

2. The district court's Order of Judgment stated that defendant was convicted of the offense of being a "/f/elon in possession of a firearm (armed career criminal) in violation of Title 18, U.S. Code, Section 924(e) as charged in the indictment herein".

3. Lowe argued, among other things, that the indictment did not properly charge an offense and that he was unduly prejudiced as a result of the

Sec. 924(e) charge because the jury was advised of his three prior felony convictions.

4. The pertinent portions of 18 U.S.C. Sec. 922(g) provide:

It shall be unlawful for any person-

(1) who has been convicted in court of, a crime punishable by imprisonment for a term exceeding one year.... to ship or transport in interstate or foreign comerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

5. While an indictment must also be sufficiently clear to enable the defendant to plead that an acquittal or conviction stand to bar subsequent prosecution. United States v. Garcia-

Geronimo, 663 F.2d 738, 743 (7th Cir. 1981) (citing Hamling v. United States, 418 U.S. 87, 117 (1973), Lowe does not purport to challenge the indictment on these grounds. In any event, our conclusion that the indictment properly charged an offense under Sec. 922(g) disposes of any such concerns.

6. For example, the Court made particular reference to Congress' findings and declarations preceding the statute:

> Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons.... constitutes -
>
> (1) a burden on commerce or threat affecting the free flow of commerce....

Scarborough, 431 U.S. at 571 n. 10 (quoting 18 U.S.C. App. Sec. 1201).

7. Lowe's claim relative to the trial court's instructions on the commerce

element of Sec. 922(g) is that the inclusion of references to "foreign commerce" constructively amended the indictment by adding to the charges against him. As the Eleventh Circuit has recently stated, "a constructive amendment to the indictment occurs where the jury instructions "so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged in the indictment". United States v. Peel, 837 F.2d 975, 979 (11th Cir. 1988). Under this test, we fail to see how the inclusion of the term "foreign commerce" in the instructions constitutes a constructive amendment to the indictment since the term was defined synonymously with "interstate commerce", and the limited references to "foreign commerce" were made only as

part of the direction to the jury that it must find that the firearm had "traveled from one state to another". We conclude, after reading the instructions as a whole, United States v. Machi, 811 F.2d 991, 995 (7th Cir. 1987), that the references to "foreign commerce" did not modify the elements of Sec. 922(g).

8. In its intirety, 18 U.S.C. Sec. 924(e)(1) provides that:

> In the case of a person who violates Section 922(g) of this title, and has three previous convictions by any court referred to in Section 922(g) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such persons

with respect to the conviction under Section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

9. Stated in these terms, the Rule of Lenity conveniently frames an aspect of the tension inherent in the two views of the substantive nature of Sec. 924(e). The dissenting jurists who have concluded that the statute creates a separate offense have stressed that to hold otherwise would allow the accused to suffer a significantly larger penalty without "the full panopoly" of constitutional protections afforded a defendant. Hawkins, 811 F.2d at 230 (Rosenn, J. concurring in part, dissenting in part). See also Rush, 840 F.2d at 580 (Gibson, J. dissenting). In contrast, a number of

the courts that have held that Sec. 924(e) is a sentence-enhancement provision have highlighted the prejudice inherent in stating the sentencing facts of three felony convictions in the indictment in accordance with the Fifth Amendment, presenting the historical facts surrounding the convictions to jury for its deliberation as mandated by the Sixth Amendment, and requiring that such convictions be established beyond a reasonable doubt under the strictures of the due process clause. Jackson, 824 F.2d at 25. Since we are convinced that the intent of Congress is clear as to the nature of Sec. 924(e), however, we need not decide which of these two views is harsher for the purpose of applying the Rule of Lenity.

10. Stated in its entirety, the Fifth Circuit's position is that Congress

used the term"enhancing" to mean the creation of a new federal crime. In support of this proposition, the Davis court relies on a part of the sectional analysis of the House Report on the ACCA, which states:

> Section 2 amends 18 U.S.C. App. Sec. 1202(w) by adding a new offense proscribing any felon who has been convicted previously of three felonies for robberies or burglaries (either Federal or State) from receiving, possessing, or transporting in commerce or affecting commerce, any firearm.

H.R. Rep. No. 1073, 98th Cong., 2d Sess. at 6 (1984) (emphasis added). Although the foregoing statement supports the Fifth Circuit's view, it does not comport with the gist of the entire House Report or many of the other references in the Report to the

effect of the ACCA. See, e.g. id. at 1 (Introduction to report recommending passage of the "bill.... to provide enhanced penalties for certain persons possessing firearms after three previous convictions..."). Standing alone, the quote relied upon by the Fifth Circuit would seem to be a mis-statement. On balance, we believe that it does not offset the numerous direct references to sentence or penalty enhancement which we and the majority of other courts have cited. Jackson, 824 F.2d at 25.

11. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident.

12. Although we need not decide what procedures are constitutionally mandated when the government seeks enhanced sentencing for a defendant who meets the requirements of Sec. 924(e), our holding today should make it clear that the indictment should not contain references to a defendant's prior felony convictions beyond the initial one required for the predicate offense, and that the additional convictions are pertinent only for the purpose of sentencing the defendant under Sec. 924(e). The concerns raised by this case and Pirovolos, 844 F.2d at 430, would be avoided if the government followed such a course in accordance with its repeatedly stated belief that Sec. 924(e) is a sentence-enhancement provision.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

vs.

JUDGMENT IN A CRIMINAL CASE

DARRELL I. LOWE,
In Custody

Case Number:
87-40006-01

(Name and Address of Defendant)

Douglas C. Scovil
Attorney for Defendant

THE DEFENDANT:

there having been a verdict of guilty as to count one

is convicted of the offense of: Felon in possession of a firearm (armed career criminal) in violation of Title 18, U.S. Code, Section 924(e) as charged in the Indictment herein.

THEREFORE, IT IS THE JUDGMENT AND SENTENCE OF THIS COURT THAT: Defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a minimum term of fifteen (15) years without parole pur-

suant to Title 18, U.S. Code, Section 924 (e)(1) with credit to be given for time already served.

The Court orders committment to the custody of the Attorney General and recommends: 1) Defendant be incarcerated in the least security classification as possible. 2) Defendant be incarcerated in a facility as close to Central Illinois as possible.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3014 for count one.

IT IS FURTHER ORDERED that the defendant shall immediately notify the United States Attorney of this district of any changes of his address until all fines, restitution, costs and special assessments are fully paid.

IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of

this judgment to the United States Marshal of this district.

February 4, 1988
Date of Imposition of Sentence

/s/ Michael M. Mihm
Signature of Judicial Officer
Name and Title of Judicial Officer

February 4, 1988
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | FILED |
| | ) | APRIL 8, 1987 |
| Plaintiff, | ) | John M. Waters, |
| | ) | Clerk, |
| vs. | ) | U.S. District |
| | ) | Court, |
| DARRELL I. LOWE, | ) | Central Dis- |
| | ) | trict of |
| Defendant | ) | Illinois |

CRIMINAL NO.
87-40006
VIO: Title 18
United
States
Code,
Section 924(e)

INDICTMENT

The Grand Jury charges:

COUNT I

On or about January 4, 1987, at Rock Island, In Rock Island County, in the Central District of Illinois, the defendant,

DARRELL I. LOWE,

did knowingly possess a firearm which had previously travelled in interstate commerce,

to-wit: a Liberty .22 caliber revolver with an obliterated serial number, the defendant having been previously convicted three times under the laws of the State of Illinois for felony crimes of violence.

In violation of United States Code, Title 18, Section 924(e).

A True Bill,

/s/Danny H. Hathaway,
Foreperson

/s/ J.Wm. Roberts
J. WILLIAM ROBERTS
United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Filed Aug. 13, |
| | ) | 1987, John M. |
| Plaintiff, | ) | Waters, Clerk, |
| | ) | U.S. District |
| vs. | ) | Court, Central |
| | ) | District of |
| DARRELL I. LOWE, | ) | Illinois. |
| | ) | CRIMINAL NO. |
| Defendant | ) | 87-40006 |

MOTION TO DISMISS

NOW COMES the defendant, Darrell I. Lowe, by his attorney, Douglas C. Scovil, of Ruud & Scovil, and moves this Court to dismiss the indictment filed herein on April 8, 1987, and in support of said Motion, states as follows:

1. That the indictment does not charge any violation of the laws of the United States of America as to the defendant, Darrell I. Lowe, in that Title 18, Section 924(e) does not contain a substantive offense of which a person can be found guilty; but rather is a sentencing

provision and a person cannot be deemed guilty of having violated a provision relating to sentencing.

2. Additionally, this Court lacks subject matter jurisdiction over the instant offense for the reason that, in order to be guilty of violating Title 18, Section 922(g), the defendant would had to have shipped or transported in interstate or foreign commerce, a firearm; or received a firearm which had been shipped or transported in interstate or foreign commerce.

3. There is nothing in the indictment or the Grand Jury Minutes which shows that the defendant in fact shipped or transported in interstate commerce a firearm; nor is there any evidence showing that the defendant possessed in, or affected, commerce any said firearm; nor is there anything that shows that the defendant received any firearm which had been shipped or transported in interstate commerce. The

indictment charges that the defendant possessed a weapon which had previously been transported in interstate commerce and this would not be a violation of any provision of the United States Code; and for the Legislature to attempt to make it a crime for a person simply to possess an article which had previously been transported in interstate commerce, without there being a sufficient nexus between transportation of said article in interstate commerce and the commission of an offense, is a creation of a statutory scheme which is both unreasonable, contrary to the provisions of the Constitution, and the denial of due process, and creates a statutory scheme that is vague, indefinite, uncertain and, therefore, unconstitutional.

4. The indictment does not state sufficient facts as to the defendant to show any violation of Title 18, Section

922(g) or 924(e).

5. The indictment fails to allege necessary essential elements of the offense, as it does not allege that the defendant received a firearm which had been shipped or transported in interstate or foreign commerce; and the testimony before the Grand Jury clearly indicates that the Government's position was not to prosecute the defendant for having transported or been in possession or affecting commerce with respect to said weapon.

6. A copy of said Minutes of the Grand Jury Testimony are not attached hereto for the reason, on information and belief, it is alleged that the same is available to the Government and having previously been provided as part of the discovery to the defendant; however, at the time of the hearing of said Motion, a copy will be provided to the Court.

7. The Grand Jury testimony afore-

mentioned is not sufficient to establish probable cause based on the evidence presented for the Grand Jury to have returned a True Bill, and said prosecution should in fact be dismissed.

8. There is nothing in the indictment which shows that any action on the part of the defendant affects commerce under Title 18, Section 1951, and therefore this Court lacks subject matter jurisdiction.

9. The statutory scheme with which the defendant is charged is a denial of equal protection and due process, and is void for vagueness.

Respectfully Submitted,

By: Glenn F. Ruud, for
Douglas C. Scovil,
Attorney for Defendant

Proof of Service

Douglas C. Scovil
of Ruud & Scovil
2009 9th Avenue
Rock Island, IL 61201
Telephone: 309-788-8811

cc: Bradley W. Murphy
Asst. U.S. Attorney
Central District of Illinois
100 N.E.Monroe St.
Peoria, IL 61602

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>DARRELL I. LOWE,<br><br>Defendant | NO. 87-40006<br>FILED<br>OCTOBER 1, 1987 |

MOTION IN LIMINE

NOW COMES the Defendant, Darrell I. Lowe, by his attorney, Douglas C. Scovil, of Ruud & Scovil, and as and for his Motion in Limine, respectfully files the following request:

1. That the Government or any of its witnesses be prohibited from the use or mention at the time of trial of any prior felonies that the defendant has been convicted of, unless the defendant takes the stand to testify; for the reason the defendant has stipulated to the fact that he has three prior violent felonies as the

same is defined by Title 18, Section 924 (e) of the United States Code.

2. That the Government and any of its witnesses be prohibited from introducing at the time of trial any testimony concerning the gun which was seized from the defendant's person for the reason the same was the result of an unlawful arrest and an unlawful search and seizure.

3. That the Government be prohibited from introducing or making reference to, or introducing testimony about, any records pertaining to the firearm in question or its movement, other than those reports attached to the Government's Answer to the Defendant's Pre-Trial Discovery.

4. That the Government be prohibited introduction or mention of any evidence concerning two fingerprints from the defendant or from any item seized from the person of the defendant, for the reason that the defendant has stipulated that he

has three prior violent felonies as the same term is defined by Title 18, Section 922(e) of the United States Code; or from introducing any evidence pertaining to fingerprints of the defendant, or found on any property seized from the defendant in excess of what was provided to the defendant in the Government's Response to Defendant's Motion for Pre-Trial Discovery.

Respectfully Submitted,

/s/ Douglas C. Scovil
Douglas C. Scovil,
Attorney for Darrell I. Lowe, Defendant

Proof of Service

## APPENDIX F

The evidence consits of the sworn testimony of the witnesses, the exhibits received in evidence, and stipulated facts.

A stipulation is an agreed statement of facts between the parties, and you should regard agreed statements as true.

You are to consider only the evidence received in this case. You should consider this evidence in the light of your own observations and experiences in life. You may draw such reasonable inferences as you believe to be justified from proved facts.

You are to disregard any evidence to which I sustained an objection or which I ordered stricken. Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded. You should not be influenced by sympathy, prejudice, fear or public opinion. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

To sustain the charge of Felon in

possession of a Firearm the government must prove the following propositions:

First: That the defendant knowingly possessed a firearm; and,

Second: That the firearm had previously travelled in interstate or foreign commerce; and

Third: That the defendant had previously been convicted three times for felony crimes of violence.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

It shall be unlawful for any person

who has three previous convictions by any court for a violent felony to possess any firearm that has previously travelled in interstate or foreign commerce.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) Filed Oct. |
| | ) 8, 1987 |
| Plaintiff, | ) John M. |
| | ) Waters, Clerk |
| vs. | ) U.S. District |
| | ) Court, Cen- |
| DARRELL I. LOWE, | ) tral District |
| | ) of Illinois |
| Defendant | ) NO.87-40006 |

MOTION IN ARREST OF
JUDGMENT

NOW COMES the Defendant, Darrell I. Lowe, by his attorney, Douglas C. Scovil, of Ruud & Scovil, and, pursuant to Rule 34 of the Federal Rules of Criminal Procedure, files this Motion in Arrest of Judgment, and in support thereof respectfully states and alleges unto this Court as follows:

1. This Motion is timely filed within seven (7) days of the date of the entry of the jury verdict on the indictment filed herein against defendant, Darrell I. Lowe.

2. The indictment filed herein against defendant, Darrell I. Lowe, does not charge an offense; additionally, this Court lacks subject matter jurisdiction to hear the offense for the reason that the statute in question was unconstitutional, in that it denied the defendant due process and was unconstitutionally vague, both on its face and as applied to the facts of the instant case.

3. The fact that there were defects in the indictment was called to this Court's attention pursuant to a 12(b)(2) Motion prior to the time of the final pre-trial herein; said Motion was heard and adjudicated adverse to the interest of the defendant.

4. A Motion under Rule 34 is to be decided only on the basis of the indictment, the plea and the verdict, all of which represent the record for the purpose of a Rule 34 Motion, without regard to any

evidence or the sufficiency or admissibility of any of the evidence.

5. In view of the fact the defendant has challenged the sufficiency of the indictment by a pre-trial motion in this particular post-trial Motion in Arrest of Judgment, the presumption to construe the indictment liberally in favor of sufficiency does not apply. U.S. v. Gironda, 758 Fed.2d 1201,1210 (C.A. 7th 1985).

6. A case in support of the position that this Court lacked subject matter jurisdiction, if in fact the statute in question is determined to be unconstitutional, can be found at U.S. v. Eposito, 492 Fed.2d 6 (C.A.7th 1973).

7. The defendant is in fact denied his due process rights under the 5th Amendment because of the poor wording of the statute in question; and because of the ambiguity and lack of clarity contained in the statute and the fact that

persons of reasonable intelligence are called upon to guess at the meaning and application of the statute.

8. Additionally, the statute under which the defendant is charged denies him due process, in that it unduly prejudices the jury against him by requiring that the jury be advised that the defendant has three prior violent felony convictions. The knowledge of that fact would impermissibly taint the minds of the jury and predispose the jury to drawing inference from any testimony or evidence presented that would be adverse to the defendant based on his prior record, as opposed to based on the evidence adduced at the time of trial.

WHEREFORE, for the reason that the statute in question is unconstitutional, and a denial of due process, and void for vagueness both on its face and as applied; and for the reason that the indictment

under which the defendant was charged failed to state an offense, the defendant's Motion in Arrest of Judgment should in fact be allowed, and the defendant's judgment of guilt, premised upon the jury verdict, vacated.

DARRELL I. LOWE, Defendant,

BY: /s/ DOUGLAS C. SCOVIL
Douglas C. Scovil, His Attorney

Proof of Service

cc: Brad Murphy, Asst. U.S. Attorney
Darrell I. Lowe

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT ROCK ISLAND

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) Filed Oct. 8, |
| | ) 1987 |
| Plaintiff, | ) John M. Waters, |
| | ) Clerk, U.S. |
| vs. | ) District Court, |
| | ) Central Div. |
| DARRELL I. LOWE, | ) of Illinois |
| | ) |
| Defendant | ) NO. 87-40006 |

MOTION FOR NEW TRIAL

NOW COMES the Defendant, Darrell I. Lowe, by his attorney, Douglas C. Scovil, of Ruud & Scovil, and pursuant to Rule 33 of the Federal Rules of Criminal Procedure, files this Motion for a New Trial, and in support thereof respectfully states and alleges unto this Court as follows:

1. This Motion is timely filed, based upon the fact the jury returned a Verdict on October 2, 1987, and not more than seven (7) days have elapsed since the entry of the judgment based upon that jury verdict.

2. A Motion under Rule 33 of the Fed-

eral Rules of Criminal Procedure should be granted by this Court as it is required in the interest of justice, in that the errors that the defendant alleges in this Motion, when construed either individually or when taken as a whole, clearly show that the errors that occurred during the trial proceeding were not merely harmless errors, but were prejudicial in nature.

3. The jury verdict was against the manifest weight of the evidence presented. U.S. v. Simms, 508 F.Supp.1188, 1202 (L.A. 1980). In the cited case, the Court held that the standard applicable to a Motion for New Trial is different than that used to rule upon a Motion for Verdict of Acquittal. A Motion for New Trial is directed to the sound discretion of the trial court, and, under the broad powers possessed by the Court, the Court may weigh the evidence, consider the credibility of

the witnesses, and the inferences that could be drawn from said evidence. A Motion for New Trial is directed to the conscience of the Court to determine whether or not a miscarriage of justice has resulted as a result of any rulings by the court or determinations made by the jury as a result of their deliberations. The Appellate Court for the Seventh Circuit has aptly stated the rule in the case of Appelbaum v. U.S., 274 Fed. 43, 46 (C.A. 7th 1921).

4. The Court erred in failing to allow the defendant's Motion for a Verdict of Acquittal at the close of the Government's case, as well as at the close of all the evidence.

5. A trial Court may enter a judgment of acquittal with respect to the charges charged in the indictment if the evidence is insufficient to sustain a conviction for the charged offense. The purpose of

the judgment of acquittal is to protect the defendant from an improper or irrational verdict of a jury which may not be capable of applying correctly and strictly the instructions of the Court, or to return a verdict which is based upon evidence not developed solely at the time of trial.

6. In ruling on the Motion for Verdict of Acquittal at the close of the Government's case and at the close of all the evidence, this Court is to consider all of the evidence in the light most favorable to the Government and grant the Motion when it appeared that the evidence was insufficient to sustain a conviction. The Government is, however, entitled to the advantage of all reasonable inferences that could be drawn from the evidence. U.S. v. Beck, 615 Fed.2d 441, (C.A. 7th 1980). When the evidence is reviewed by the Court in accordance with the aforementioned standard,

it is clear that the evidence is so scant that the jury could have only speculated as to the defendant's guilt, and that the evidence was such that a reasonable-minded juror must have a reasonable doubt as to the defendant's guilt with respect to the charged offense. Under those types of circumstances, the Court should have entered a verdict of acquittal. U.S. v. Liefer, 778 Fed.2d 1236 (C.A.7th 1985).

7. The statutory scheme under which defendant was charged was unconstitutional, in that it was the product of legislation that dealt with more than one subject matter, in that the section charging the defendant with being an armed career criminal in violation of Title 18, Section 924(e), was the result of an amendment to an act that dealt primarily with drug trafficing and, as such, the legislation in said package should have been limited

to drug trafficing and not dealing with the matter of armed career criminals. For the reason that the legislation impermissibly dealt with more than one subject matter at a time, the legislation is unconstitutional.

8. The instant statutory scheme under which the defendant was charged is unconstitutional and void for the reason there is more than one piece of legislation dealing with the same subject matter of record at the same time.

9. The court committed reversible error when it allowed into evidence Government's Exhibit 1 and 2, to-wit: the handgun and bullets, for the reason there was an improper foundation laid, improper chain of custody established and for the reason that the Government had stipulated at the time of the final pre-trial preceding the trial that it had no tangible evidence that it would introduce at the

time of trial. Then on the day of trial, the Government tendered a list of Exhibits at the commencement of the trial proceeding. Further, the admission of the bullets was prejudicial, in that the defendant was not charged with being in possession of any ammunition; and the ammunition was not germane, relevant or material to any of the issues framed by the indictment. But the admission of said ammunition served to prejudice and inflame the passions and prejudices of the jury to the detriment of the defendant's right to receive a fair trial. Additionally, the defendant seasonably and timely objected to the admission of Exhibits 1 and 2 of the Government.

10. The statute under which defendant was convicted (Title 18, Section 924(e) and 922(g) of the United States Code) is unconstitutional, in that they are void for vagueness, both on their face and as applied to the defendant, and for the

reason they deny him due process, as more fully set forth in the Motion in Arrest of Judgment previously filed herein, which, by reference, is incorporated herein as additionally providing a basis for a new trial.

11. The Court erred in not granting the defendant's Motion for Mistrial made during the course of the proceedings on the basis that the Government had failed to comply with the pre-trial discovery motions; in particular, it failed to comply with the Order that required that all favorable materials be turned over to the defendant according to the Supreme Court's holding in Brady v. Maryland. More specifically, at the time of the trial, a document which had been marked as Plaintiff's Exhibit 2 came to light and at no time prior to the trial had the defendant's counsel been provided with the same. And what had been marked as Plaintiff's Ex-

hibit 2 was in fact a document prepared by the Government's expert and relied upon in forming his opinion and relied upon in giving his testimony as an expert to the jury. Additionally, it became known thereafter that the Government's experts had in their possession certain other documentation with respect to the fact that there were thirteen (13) other companies doing business under the name Liberty Arms; and none of this material was disclosed to counsel for defendant prior to the trial. While it was correct for the trial court to order that the material be turned over to counsel for the defendant, counsel for the defendant could not adequately and in a meaningful way evaluate the material contained in said reports; and the fact that the agents for the Government failed to turn this material over to the United States Attorney should not preclude them from being sanctioned for their failure

to turn over possible exculpatory evidence to the defendant, in view of the fact that the Request for Discovery was directed not only to the United States Attorney but to the agents of the Alcohol, Tobocco and Firearms Division of the U.S. Treasury Department.

12. The Government impermissibly, during the voir dire proceedings, struck the only young, black female juror. The defendant alleges that the striking of this person on the basis of their race and age denied him an impartial jury. While the U.S. Attorney, in comments to the Court indicated that the striking of the juror was not motivated by racial reasons, he did indicate the age was a factor, in that he felt she was too young, and that the striking of jurors premised upon age is an impermissible discrimination and a purposeful discrimination which denied the defendant a fair and impartial jury.

13. The evidence and exhibits admitted into trial wholly failed to establish that the defendant in any way violated Title 18, Section 924(e), and, more specifically, that he violated Title 18, Section 922(g). Under the relevant statutory sections, the defendant could have been guilty of committing the offense in one of our ways: 1) if he would have shipped in interstate or foreign commerce a firearm; 2) if he would have transported in interstate or foreign commerce a firearm; 3) if he would have possessed in commerce a firearm; and 4) if he would have affected commerce with a firearm. During the course of these proceedings, the Government stipulated that it was not charging the defendant with having shipped or transported in interstate or foreign commerce a firearm; or having possessed in commerce a firearm; therefore leaving the only operable portion of the statute being that he affected com-

merce with a firearm. The evidence established that the agent in charge of the case, in his testimony before the Grand Jury, had indicated that the defendant did not affect commerce. In view of this admission, the U.S. Attorney and its agents have stipulated to the fact that the defendant could not be found guilty of having violated Title 18, Section 922(g)(1).

14. The evidence in the record fails to show that anything the defendant did with respect to any alleged possession of the firearm in question in any way, shape or form affected commerce, or had any nexus with commerce so as to allow for the Commerce Clause of the United States Constitution to be invoked as the jurisdictional prerequisite and basis for the instant proceeding against the defendant. The defendant further asserts that any alleged connection between him, the firearm, and commerce is so attenuated and the rele-

vant nexus is lacking that to prosecute him is a denial of due process under the Fifth Amendment to the United States Constitution.

15. The statutory scheme under which the defendant was charged, and the jury verdict returned, is unconstitutional in that Title 18, Section 924(b) requires that anyone who knowingly violates Section 922(g) can in fact be guilty of an offense and fined no more than Five Thousand Dollars or imprisoned more than five years, or both. However, under 924(e)(1), a person who violates 922(g) of Title 18, without a specific intent of knowledge, is guilty of a more serious offense than one who knowingly violates the same subsection; and the statute is unconstitutional as the offense for the violation of the statute with general intent is more severe than the violation of the statute with specific intent. And, as such, the sen-

tencing provisions are unconstitutional and violative of the Eighth Amendment to the United States Constitution.

16. The judgment entered upon the jury verdict should be vacated and the defendant a new trial for the reason that the defendant was denied a fair trial, in that he was prejudiced by the fact that this Court had made rulings on the first day of trial with respect to evidentiary matters and had made comments at the preliminary jury instruction conferences which indicated that the Government was not going to be allowed to instruct the jury or to argue to the jury the fact that the gun in question may have moved in foreign commerce; the Court having ruled that the Government had made an election as to how it was going to prove the offense in the indictment and that it had limited itself to proving interstate movement of the weapon in question. Thereafter, the court reversed itself and, in

reliance on the court's prior ruling that the Government was not going to be able to instruct the jury that the defendant could be found guilty if they proved that the gun had moved in foreign commerce, the defendant, through his attorney, did not object to the admission of certain pieces of evidence; and, as a matter of fact, tendered certain pieces of evidence, to-wit: defendant's Exhibits 1 and 2, premised upon the fact that they would establish that the Government could not prove interstate movement of the firearm in question. For the court to have made certain rulings in the course of the trial, and thereafter for counsel for defendant to have planned his trial strategy and his examination of witnesses, and to have that ruling reversed in the middle of the trial, denied the defendant a fair and impartial hearing and trial, and amounted to reversible error.

17. The defendant was denied a fair

trial and the court erred in its rulings with respect to the defendan't Motion to Dismiss filed prior to the commencement of trial, the Court's denial of defendant's Motion to Strike Surplusage from the indictment, and in particular the words "crimes of violence", denying the defendant's Motion to Quash his Arrest and to Suppress illegally Seized Evidence; and for the reason that the evidence clearly establishes that there was no probable cause for the original arrest or for the original search. Anything that was found as a result of the impermissible, illegal and unlawful search and arrest must be suppressed.

18. With respect to the jury instructions, the defendant objected to the giving of Government's Tendered Instruction No. 23, which was given over his objection; Government instruction No. 18A which was given over objection; Government Instruction No. 19 was given over objection, for all of the

reasons asserted on the record at the time said instructions were tendered. Additionally, the defendant objected to Government instruction No. 22 as the same was confusing and should not have been given for the reason the same was a definition of interstate commerce or foreign commerce as opposed to a definition of commerce. Under the indictment, the defendant was not charged with an offense that involved interstate or foreign commerce, but was charged with an offense of possession that affected commerce; so it was error to instruct the jury as to what interstate or foreign commerce was and tell the jury that interstate or foreign commerce was the same as affecting commerce. Additionally, the defendant objected to the giving of instruction 17B as the same was a misstatement of the law; and it did not track that language in the indictment, in that it alleges that the gun had previously travel-

led in interstate or foreign commerce, contrary to the allegations in the indictment which the defendant was called upon to answer.

19. Defendant objected to the giving of instruction 25B for the reason the same is a misstatement of the law with respect to the case at hand, in that the Instruction defines commerce as travel, trade, traffic, commerce, transportation or communication among the several states. When this instruction is added to instruction No. 22, it served only to confuse the jury and not sharply and crisply define the law that they were to apply in determining whether or not the defendant was guilty of the allegations in the Grand Jury Indictment. Additionally, the defendant objected to Government Instruction No. 12B as amended, for the reason that the same was a misstatement of the law and a misstatement of the charge placed against the defendant in the

Grand Jury Indictment.

20. Additionally, the defendant objects to the failure of the court to give Defendant's Tendered Instruction Nos. 2, 3, 4, 8, 10, 11, 12, 16 as tendered and refused at the Jury instruction conference.

21. The defendant further asserts that, while any one of the errors complained of in this Motion is sufficient to grant him a new trial, the cumulative affect of all of the errors was to deny defendant a fair trial, thereby entitling him to an allowing of his Motion for New Trial.

22. The Court erred in restricting counsel for the defendant to twenty (20) minutes in closing argument in view of the fact that the defendant's case was based upon reasonable doubt, in large part based upon the defendant not taking the stand to testify; and the restriction of counsel's argument denied the defendant

a fair trial.

23. The aforementioned Motion is made without the benefit of a transcript and the defendant reserves the right to pursue, on appeal, any errors that appear in the record as matters of plain error, without having been raised in this Motion which has been made without the benefit of a transcript.

24. The Court erred in allowing attorney John Bell, Jr. to withdraw as attorney for Darrell I. Lowe and allowing attorney Joseph Trujillo to take over his representation. The defendant wanted to have attorney John Bell, Jr. to continue as his counsel as it had come to his attention that Joseph Trujillo had stated certain things to him that were not true and he no longer had any trust or confidence in attorney Trujillo's ability to represent his interests.

25. The Court erred when it allowed

the jury to depart without being sequestered after the first day of trial, especially in view of the fact that on the first day of trial, to-wit: October 1, 1987, there was a shooting incident which resulted in the death of a Peoria County Sheriff's Deputy, the jury should have in fact been sequestered and kept together so as not to be exposed to any potential newspaper, radio, television, or other information relating to the shooting. Even though the Judge advised the jury to avoid listening to any reports, that was an inadequate safeguard to preserve defendant's right to a fair and impartial trial.

WHEREFORE, defendant prays that his Motion for New Trial be allowed.

DARRELL I. LOWE, Defendant
BY /s/ Douglas C. Scovil
his attorney
Proof of Service
cc: Brad Murphy, Asst. U.S. Attorney; Darrell Lowe

## APPENDIX I

## AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

V.

No person shall be held to answer for a capital crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any capital case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX J

## STATUTES OF THE UNITED STATES

### Title 18 U.S. Code, Section 924(e)(1)

Penalties

In the case of a person who violates Section 922(e) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection -

(A) the term "serious drug offense" Means -

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq), the Controlled Substance Import and Export Act (21 U.S.C. 951 et seq), or the first section or Section 3 of Public Law 96-350 (21 U.S.C. 955a et seq) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act ) (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law; and (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that -

(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Title 18, U.S. Code, Section 922(g)

Unlawful Acts

(g) It shall be unlawful for any person -

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act) (21 U.S.C. 802);

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 U.S. Code, Section 3231.

District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the

courts of the several States under the laws thereof.

Title 28 U.S. Code, Section 1254.

Courts of Appeals; certiorari; appeal; certified.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 28 U.S. Code, Section 1291.

Final Decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the Distrist of the Canal Zone, the District Court of Guam, and the District Court of the Vir-

gin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1294 of this Title. (As amended Oct. 31, 1951, c. 655, 48,65 Stat. 726; July 7, 1985, Pub. L. 85-508, 12 (e) 72 Stat. 348; Apr. 2, 1982. Pub. L. 97-164, Title I, 124.96 Stat. 36).

Title 28 U.S. Code Section 1294. Circuits in which decisions reviewable.

Except as provided in section 1292(c), 1292(d) and 1295 of this title, appeals from reviewable decisions of the district and territory courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States of the court of appeals for the circuit embracing the district.

Federal Rules of Evidence 404 (b), Title 28 U.S. Code.

Character Evidence not Admissable to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of a proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rules 7-8, 608 and 609.

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1166

# In the Supreme Court of the United States

OCTOBER TERM, 1988

---

DARRELL I. LOWE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WILLIAM C. BRYSON
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## QUESTIONS PRESENTED

1. Whether the current version of the Armed Career Criminal Act, 18 U.S.C. 924(e), (Supp. IV 1986) creates a separate criminal offense or merely constitutes a penalty enhancement provision.

2. Whether, assuming that the Armed Career Criminal Act is merely a penalty enhancement provision, due process was violated because the government alleged in the indictment that petitioner possessed a firearm after having previously been convicted of multiple felony offenses.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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No. 88-1166

DARRELL I. LOWE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-61) is reported at 860 F.2d 1370.

## JURISDICTION

The judgment of the court of appeals was entered on October 17, 1988. The petition for a writ of certiorari was filed on December 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of possession of a firearm as a previously convicted felon, in

violation of 18 U.S.C. 922(g) and 924(e) (Supp. IV 1986). Under the enhanced penalty provisions contained in Section 924(e), petitioner was sentenced to 15 years' imprisonment without possibility of parole. The court of appeals affirmed (Pet. App. 1-61).

1. On the evening of January 4, 1987, police officers were dispatched to a Rock Island, Illinois, tavern to break up a bar fight. They were warned that one of the disputants might be armed with a handgun. When the officers arrived at the tavern, they saw petitioner arguing with another person. After separating the disputants, the officers frisked petitoner and found a .22 caliber revolver stuck in his belt. Pet. App. 3. An investigation disclosed that the firearm had traveled in interstate commerce following its manufacture in West Germany and that petitioner had three prior convictions for "violent felon[ies]" within the meaning of 18 U.S.C. 924(e)(2)(B) (Supp. IV 1986).

2. Petitioner was thereafter charged in a one-count indictment (Pet. App. 65-66) with unlawful possession of the revolver after "having been previously convicted three times under the laws of the state of Illinois for felony crimes of violence," in violation of 18 U.S.C. 924(e) (Supp. IV 1986). Petitioner moved to dismiss the indictment, arguing *inter alia* that Section 924(e) was a sentence-enhancement provision rather than a separate substantive offense (Pet. App. 67-68). When the district court denied the motion to dismiss, petitioner stipulated that he had three prior state court convictions for purposes of Section 924(e) and successfully moved *in limine* (Pet. App. 73-75) to prevent the government or any of its witnesses from mentioning the prior convictions at trial (see Pet. App. 4). Thus, the jury was "kept * * * from ever hearing anything about the types of previous crimes [petitioner] had committed" (Pet. App. 49).

In its instructions to the jury, the district court charged, in part, that the jury could convict petitioner only if it found beyond a reasonable doubt "[t]hat [petitioner] had previously been convicted three times for felony crimes of violence" (Pet. App. 77). The jury found petitioner guilty as charged, and the district court imposed the mandatory minimum sentence required under Section 924(e).

3. The court of appeals affirmed (Pet. App. 1-61). It held that the Armed Career Criminal Act established an enhanced penalty for armed repeat offenders, not a separate substantive offense (Pet. App. 18-29). The court held that there was accordingly no requirement that the indictment allege or the government prove beyond a reasonable doubt at trial the existence of three or more prior "violent felony" convictions that would trigger the enhanced penalty provisions of the Armed Career Criminal Act (*ibid.*).

The court of appeals further held that petitioner was not prejudiced when the government alleged and proved the existence of three "violent felon[ies]" in this case. The court noted that no mention was made at trial of the nature or circumstances of the prior convictions because of a stipulation between the parties, and the evidence of petitioner's guilt on the firearms possession charge was overwhelming (Pet. App. 47-51).

## ARGUMENT

Petitioner contends that the Armed Career Criminal Act, which is currently codified as 18 U.S.C. 924(c) (Supp. IV 1986), is a sentencing enhancement provision and that he was accordingly prejudiced when allegations that would justify the imposition of an enhanced sentence were included in the indictment charging him with unlawful possession of a firearm as a previously convicted felon. As

the court of appeals correctly held, Section 924(e) is a penalty enhancement provision, and not a separate offense. But, as the court of appeals also held, petitioner was not prejudiced by the presence in the indictment of allegations concerning multiple prior convictions that would make him susceptible to enhanced punishment following his conviction on the instant firearms charge. Further review by this Court is unwarranted.

1. There is no occasion for this Court to consider the question whether the Armed Career Criminal Act constitutes a penalty enhancement provision, rather than a separate offense. Petitioner to the contrary (Pet. 9-12), there is no conflict among the circuits on this question. As the court below correctly stated (Pet. App. 23), "[m]uch of the conflict over the nature of the Armed Career Criminal Act of 1984" concerned the formulation contained in the predecessor statute to Section 924(e), 18 U.S.C. App. 1202(a) (1982). By subsequently recodifying and restructuring the Armed Career Criminal Act, Congress "has settled" (Pet. App. 23) the disagreement that previously existed regarding the nature of that statute. Because petitioner was sentenced under Section 924(e), the current version of the Armed Career Criminal Act, the court of appeals was indisputably correct in holding that the statute is a sentence-enhancement provision.

In any event, the court of appeals adopted the position urged by petitioner—that Section 924(e) is an enhancement provision. The court of appeals then affirmed his conviction in spite of agreeing with his construction of the statute. He therefore has no dispute with the decision of the court of appeals on the issue on which he claims the circuits are in conflict. Indeed, petitioner would get no benefit from a holding by this Court contrary to the position taken by the court of appeals. If the statute constituted a separate offense, rather than a sentence-enhancement provision, there

would be no possible claim of error based on the inclusion in the indictment of the allegation that petitioner had committed three prior felonies. Accordingly, the alleged conflict among the circuits is immaterial to petitioner's claim before this Court.

As originally enacted, the Armed Career Criminal Act of 1984 supplemented an already existing statute, 18 U.S.C. App. 1202(a) (1982), which proscribed the unlawful possession of a firearm by a previously convicted felon. See Pub. L. No. 98-473, Tit. II, ch. 18, § 1801, 98 Stat. 2185 (1984). After the 1984 amendment, the first sentence of Section 1202(a) described the offense: possession of a gun by a previously convicted felon. That sentence also provided the unenhanced penalty for a simple violation of the statute: two years' imprisonment and a fine of not more than $10,000. The second sentence of the statute, which was added in 1984, provided that any persons who committed certain acts (precisely the same acts prohibited by the first sentence of Section 1202(a)) and who had three previous convictions for robbery or burglary (rather than only one, as required by the first sentence of Section 1202(a)), would be subject to imprisonment for not less than 15 years and a fine of not more than $25,000.

In view of this statutory language, all but one of the circuits that have addressed the issue have agreed that the 1984 version of the Armed Career Criminal Act merely authorized an enhanced penalty for an existing offense. See *United States* v. *Rumney*, No. 88-1641 (1st Cir. Feb. 8, 1989), slip op. 6-13; *United States* v. *Brewer*, 853 F.2d 1319 (6th Cir. 1988), cert. denied, No. 88-5869 (Feb. 21, 1989); *United States* v. *Pirovolos*, 844 F.2d 415, 420 (7th Cir.), cert. denied, 109 S. Ct. 147 (1988); *United States* v. *Rush*, 840 F.2d 574, 576-580 (8th Cir.) (en banc), cert. denied, 108 S. Ct. 2908 (1988); *United States* v. *Blannon*,

836 F.2d 843 (4th Cir.), cert. denied, 108 S. Ct. 1741 (1988); *United States* v. *West*, 826 F.2d 909 (9th Cir. 1987); *United States* v. *Jackson*, 824 F.2d 21, 22-26 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 715 (1988); *United States* v. *Hawkins*, 811 F.2d 210 (3d Cir. 1987), cert. denied, 108 S. Ct. 110 (1987); *United States* v. *Gregg*, 803 F.2d 568 (10th Cir. 1986), cert. denied, 480 U.S. 920 (1987). Only the Fifth Circuit concluded that the 1984 version of the Act created a separate offense. *United States* v. *Davis*, 801 F.2d 754 (1986).

In 1986, Congress repealed and replaced the original Armed Career Criminal Act. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 456-459 as amended by the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, § 1402, 100 Stat. 3207-39. The 1986 Act retained the substantive offense provision that was previously in Section 1202(a) and recodified it as 18 U.S.C. 922(g) (Supp. IV 1986). The enhanced penalty provisions that were formerly in Section 1202(a) were modified and recodified in a separate statute, Section 924(e); that statute was expressly designated a "penalties" provision, and it expressly referred to the offense set out in Section 922(g) as the predicate for its enhancement features.

Whatever the uncertainty as to the nature of former Section 1202(a), the newly enacted Section 924(e) contains—as the court below recognized—"the common indicia of [a] sentence-enhancement provision[]" (Pet. App. 23-24, quoting *United States* v. *Davis*, 801 F.2d at 756) and does not even arguably create a new offense. The Fifth Circuit, which was the only court to hold that former Section 1202(a) created a separate offense, has recognized that the new statute is clearly an enhancement provision. See *United States* v. *Vidaure*, 861 F.2d 1337 (5th Cir. 1988); *United States* v. *Affleck*, 861 F.2d 97, 98-99 (5th Cir. 1988). See also *United States* v. *Dickerson*, 857 F.2d

414, 416-418 (7th Cir. 1988). The courts of appeals are therefore in agreement that the Armed Career Criminal Act, as recodified in Section 924(e), is a sentencing enhancement provision only.

2. Petitioner also contends (Pet. 12-18) that this Court should review the "apparent practice" of the government of alleging the existence of multiple prior convictions in Armed Career Criminal Act cases, even though the Armed Career Criminal Act establishes only a sentencing enhancement scheme and not a separate criminal offense. While we agree with petitioner that Section 924(e) is merely a penalty enhancement measure, the government can hardly be faulted for alleging in the instant indictment the existence of multiple "violent felony" convictions that would make petitioner amenable to Armed Career Criminal Act treatment. Nor was petitioner unfairly prejudiced by the allegation.

As the court below recognized, "the federal courts have not provided the government with sufficient guidance on this point" (Pet. App. 19). Thus, at the time of petitioner's prosecution, two circuits had held that the Armed Career Criminal Act—albeit in its original version—created a separate criminal offense that had to be alleged in an indictment and proved at trial. See *United States* v. *Brewer*, 841 F.2d 667, 668-669 (6th Cir. 1988), vacated on reh'g, 853 F.2d 1319 (6th Cir. 1988); *United States* v. *Davis*, 801 F.2d 754 (5th Cir. 1986). Moreover, it was only "subsequent to oral argument in the present case" (Pet. App. 20) that the Seventh Circuit itself decided that Section 924(e) was a sentencing enhancement measure (see *United States* v. *Dickerson, supra*; *United States* v. *Karlin*, 852 F.2d 968, 972 (7th Cir. 1988)), and only shortly before oral argument that former Section 1202(a) was held to be a sentencing enhancement measure (see *United States* v. *Pirovolos, supra.*). Thus, although the government has believed

throughout that the Armed Career Criminal Act was only an enhancement measure, it is not surprising that, out of an abundance of caution, it has included allegations germane to the statute in indictments in circuits where the question was either an open one or had already been resolved against the government.* Now that the previous uncertainty in the circuits regarding the nature of the Armed Career Criminal Act has been resolved in light of the 1986 modifications in the statute, it is unlikely in future prosecutions that allegations pertaining exclusively to that enhancement provision will have to be included in indictments.

At all events, petitioner was not prejudiced by the allegations concerning his multiple prior felony convictions. To begin with, although the indictment erroneously cited Section 924(e) instead of Section 922(g) as the statute petitioner violated, Fed. R. Crim. P. 7(c)(3) expressly provides that "[e]rror in the citation * * * shall not be the ground for dismissal of the indictment * * * or for reversal of a conviction if the error * * * did not mislead the defendant to the defendant's prejudice." It is enough that the indictment "set[s] forth the offense" contained in the appropriate statute. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Here, the indictment alleged each element of an offense under Section 922(g): that petitioner knowingly possessed a firearm; that the firearm previously traveled in interstate or foreign commerce; and that petitioner was a previously convicted felon at the time of the offense. As the court of appeals found (Pet. App. 46-47),

* For example, even though the Seventh Circuit had not yet ruled on this issue prior to petitioner's trial, the district court both denied petitioner's motion to dismiss on this basis and further instructed the jury that it must find beyond a reasonable doubt the existence of three prior "violent felony" convictions in order to convict on the instant charge—*i.e.*, it treated the statute as if it created a separate offense.

the indictment's additional allegation that petitioner had multiple prior convictions and its miscitation of the correct statute did not detract from its validity, nor did it mislead petitioner in any respect. See *United States* v. *Kennington*, 650 F.2d 544 (5th Cir. 1981); *United States* v. *Stinson*, 594 F.2d 982, 984-985 (4th Cir. 1979); *United States* v. *Garner*, 529 F.2d 962, 965-966 (6th Cir.), cert. denied, 426 U.S. 922 (1976).

Nor was petitioner unfairly prejudiced because evidence concerning his multiple prior convictions was admitted at his trial. In prosecutions of previously convicted felons for possessing or receiving firearms, the district court may allow evidence of more than one prior conviction in order to establish the accused's status as a convicted felon. See *United States* v. *Collamore*, No. 88-1649 (1st Cir. Feb. 17, 1989), slip op. 14-16; *United States* v. *Savage*, 863 F.2d 595 (8th Cir. 1988), slip op. 7-8 (collecting cases); *United States* v. *O'Shea*, 724 F.2d 1514, 1516-1517 (11th Cir. 1984); *United States* v. *Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Kalama*, 549 F.2d 594, 595-596 (9th Cir.), cert. denied, 429 U.S. 1110 (1977); *United States* v. *Burkhart*, 545 F.2d 14 (6th Cir. 1976). That is true even where the accused agrees to stipulate that he is a previously convicted felon. *Ibid.* The multiple convictions at issue in this case therefore could have been admitted to prove that petitioner was a previously convicted felon—an element of the unlawful possession offense set out in Section 922(g).

Even if the stipulation regarding the multiple prior convictions should not have been admitted at trial, the court of appeals correctly found that petitioner was not harmed. As the court stated (Pet. App. 49-50):

> [Petitioner's] stipulation to the three previous convictions for the purpose of Sec. 924(e) and his successful Motion in *Limine* to prevent any mention of the

> convictions at trial kept the jury from ever hearing anything about the types of previous crimes [petitioner] had committed. Thus, the degree of prejudice that might normally stem from a more detailed explanation of the type of crimes involved is absent in this case. Additionally, the jury was instructed that the stipulation to [petitioner's] prior convictions constituted an agreement between the parties about one of the elements of Sec. 924(e) and that the jury did not need to determine that matter. Finally, the uncontradicted evidence of [petitioner's] guilt of violating the predicate firearm possession offense was overwhelming. [Petitioner] presented no evidence or witnesses on his behalf. The government, on the other hand, supported each element of its case with the testimony of one or more witnesses.

In such circumstances, it cannot be said that the asserted error "had substantial and injurious effect or influence in determining the jury's verdict." *United States* v. *Lane*, 474 U.S. 438, 449 (1986).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

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